Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2011

IN THE

Supreme Court of the United States

October Term 1988

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Petitioner,

v.

FRANK FORREST, et al.

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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June 30, 1988

aBCD Legal Printers, Seattle, Washington

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Pursuant to Supreme Court Rule 22.6, Petitioner Washington State Electrical Contractors Association, Inc. and other merit shop employers and employer organizations ("Merit Shop Contractors") submit this Supplemental Brief calling attention to this Court's recent decision in Patrick v. Burget, 108 S. Ct. 1658

(1988). This decision, filed on May 16, 1988, is directly applicable to this case, but was not available at the time of the filing of the Peition for Writ of Certiorari.

In Patrick v. Burget, supra, this Court reversed the Ninth Circuit's application of the state action antitrust exemption under Parker v. Brown, 317 U.S. 341 (1943) to a fact pattern remarkably similar to this case. In Patrick, the Ninth Circuit ruled that a hospital peer-review committee with responsibility for revoking hospital privileges, was protected from antitrust liability by the state action doctrine. There, as here, an agency comprised of private parties claimed to be authorized by state law to engage in anticompetitive activity. There as here, there was no evidence of actual active state supervision

of this anticompetitive conduct by any state actors. Yet, there as here, the Ninth Circuit determined that potential review by state agents constituted sufficient "active state supervision" of the private anticompetitive activity.

In reversing, this Court attacked the Ninth Circuit's conclusion that the potential for state supervision of a hospital peer-review process was sufficient.

> Respondents in this case contend that the State of Oregon actively supervises the peer-review process through the state Health Division, BOME, and the state judicial system. The Court of Appeals, in finding the active supervision requirements satisfied, also relied primarily on the powers and responsibilities of the state actors. Neither the Court of Appeals nor Respondents, however, have succeeded in showing that any of these actors reviews -- or even could review -- private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses.

108 S. Ct. at 1663 (emphasis supplied).

This Court went on to hold that the "active state supervision" requirement requires a showing, not only of authority to supervise by a state agency, but also evidence of actual supervision. Id. at 1664-65. "The mere presence of some state involvement or monitoring does not suffice." Id. at 1663. In examining alleged supervision of the private party members of the hospital peer-review committee by the Bureau of Medical Examiners for the State of Oregon ("BOME"),[1] the Court held:

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[1] The Court expressed no opinion as to whether the Board of Medical Examiners constituted a "state agency" which was immune from antitrust liability since the petition for Writ of Certiorari did not raise this issue. 108 S. Ct. at 1662, n. 4.

> Similarly, the BOME does not engage in active supervision over private peer-review decisions. . . . Certainly, respondents have not shown that the BOME in practice reviews privilege decisions or that it ever has asserted the authority to reverse them.

108 S. Ct. at 1664.

In the present case, the Ninth Circuit relied upon the same erroneous construction of the "active state supervision" requirement. Indeed, the Ninth Circuit expressly relied upon its now-reversed decision in Patrick v. Burget. The Ninth Circuit determined that the mere presence of an appointed supervisor of apprenticeship on the Washington State Apprenticeship Training Council constituted the requisite "active state supervision." Like Patrick v. Burget, however, the Ninth Circuit pointed to no evidence of actual supervision.

It was undisputed that respondents Union Appointees to the Washington State Apprenticeship Training Council ("Union Appointees") prepared the price-fixing regulation at issue requiring Merit Shop Contractors to pay union wage rates to their apprentices in order to obtain state approval of their program. There is no evidence of any action by, or even authority of, the supervisor of apprenticeship to reject this price-fixing scheme in the event it did not comport with state policy.

More importantly, there is no evidence that the supervisor reviewed or rejected the resulting union apprentice wages which set state-wide wage standards for apprentices. As discussed in the Petition for Writ of Certiorari, the Respondents, through their counsel, openly admitted that

the State could not and did not review these wages which were fixed by private parties.

Even if the Ninth Circuit correctly held that the supervisor of the apprenticeship had potential authority to reject privately negotiated union wage rates which, in turn, fixed Merit Shop Contractors' apprentice wage rates, the Ninth Circuit failed to require a showing that such active acceptance or rejection of union wage rates based upon state policy actually occurred. Indeed, the undisputed facts are that such supervision did not occur. As a result, the Court's reversal of the Ninth Circuit's holding in Patrick v. Burget is directly applicable and supports the granting of a petition for Writ of Certiorari.

For the foregoing reasons, as well as those set forth in Merit Shop Contractors' Petition for Writ of Certiorari, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit. At the very least, the Court should remand the case to the Ninth Circuit for reconsideration in light of the recent Patrick v. Burget decision.

RESPECTFULLY SUBMITTED this 30th day of June, 1988.

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